IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 869 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ISHMAILBHAI AMINBHAI SHAIKH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant – Appointed by Legal Aid Committee
MS. ARCHANA RAVAL, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 14/12/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. In this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short), challenge is to the correctness of the judgment and order dated 31.8.2000 rendered in Sessions Case No.292 of 2000 by the learned Additional Sessions Judge, Ahmedabad City, by which the sole appellant ('the accused' for short) has been convicted for commission of the offence punishable under Section 8(C) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentenced to suffer RI for 12 years and fine of Rs.1 lakh i.d., R.I. for 1 year.

2. Since the facts of the case have been detailed in the judgment of the trial court, it is not necessary for us to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed for deciding this appeal, as disclosed from the FIR and unfolded during trial, are as under:

2.1. P.W.2, Bimal M. Rajvanshi, P.I. of CID Crime, Narcotic Cell, while he was on duty on 20.5.2000,

received a secret information, that one person, viz., Ismail Andha was expected to pass through Meera Talkies between 1:00PM and 2:00PM with contraband article Charas, for delivering the same to some unknown person. He recorded the said information in the police station diary and conveyed the said secret information to higher officers, State Narcotic Cell. He thereafter requisitioned the services of panchas through Police Constables, who brought two panchas. Two panchas were informed about the secret information received by PW-2 and asked them as to whether they were willing to act as panchas. On their expressing willingness to act as panchas, he drew the preliminary panchnama in this regard.

2.2. Thereafter P.W.2 – Bimal M. Rajvanshi, along with the members of the raiding party and panchas, proceeded towards Meera Talkies and kept a watch for the aforesaid person as detailed in the secret information. At about 1:50 PM the said person was found coming from Gokul Nathji Circle towards Meera Talkies. P.W.2 along with the members of the raiding party with panchas approached him, encircled him and he inquired the person as to what was his name. He

informed that his name was Ismailbhai. P.W.2 informed the said person about the secret information received by him and in that regard he wanted to search him. He also informed him that if he wanted to be searched in presence of a gazetted officer or a Magistrate, arrangement could be made for searching him in their presence or if he do not insist that he should be searched in presence of a gazetted officer or a Magistrate, he will search him. The said person did not raise any objection for being searched by P.W.2 and did not insist that he should be searched in presence of a Gazetted officer or a Magistrate and, therefore, P.W.2 searched him.

2.3. During the course of search, a contraband article “Charas” was found which was concealed inside his shirt and was wrapped in a “Sandesh” Newspaper. On weighing the Charas it was found that the Charas carried by Ismail Andha was weighing 882 grams. Thereafter all necessary formalities with regard to seizing and sealing the said contraband article Charas after taking samples were completed and accordingly the second part of the panchnama was completed.

2.4. The accused was arrested. He was also informed about his arrest. A complaint was registered in this regard.

2.5. During the course of investigation, statements of the witnesses were recorded, muddamal contraband article Charas which was recovered from Ismail Andha was sent to FSL for chemical analysis. On receipt of the report from the FSL certifying that the said contraband article sent for analysis was Charas, the accused was charge-sheeted in the City Sessions Court, Ahmedabad for commission of the offences punishable under Section 21 of the NDPS Act, where it was numbered as Sessions Case No.292 of 2000.

2.6. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Section 8C read with Section 21 of the NDPS Act which was read over and explained to him to which he pleaded not guilty and claimed to be tried and thereupon he was put to trial by the learned Additional City Sessions Judge in Sessions Case No.292 of 2000.

2.7. To prove the culpability of the accused, the prosecution has examined and relied upon the oral testimonies of six witnesses, the details of which are given in first part of paragraph 2 of the impugned judgment and order.

2.8. To prove the case against the accused, the prosecution has produced a number of documents and relied upon the contents of the same, the details of which are mentioned in second and third part of paragraph 2 of the impugned judgment and order.

2.9. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appeared against him in the evidence of the prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the accused denied the case against him in its entirety and stated that a false case has been filed against him. He stated that while going to his house on his bicycle, someone has thrown a packet and therefore police has arrested him. However, he did

not lead any evidence nor did he produce any witness in support of his defence.

2.10. On appreciation, evaluation, analysis and scrutiny of the evidence produced by the prosecution, the trial court held that the accused was found with the contraband article Charas when he was intercepted and apprehended by the police officer. Therefore, according to the trial court, complicity of the accused for commission of the offence alleged against him has been duly established and consequently he has been convicted for commission of the offence punishable under Section 8(C) read with Section 21 of the NDPS Act and sentenced to suffer RI for 12 years and fine of Rs.1 lakh and, in default of payment of fine, RI for one year, which has given rise to instant appeal at the instance of the accused.

3. Ms. Sadhana Sagar, learned advocate of the accused, has assailed the impugned judgment and order of the trial court by contending that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on

account of non-compliance of the mandatory as well as statutory provisions of NDPS Act, the prosecution evidence cannot be relied upon and cannot be acted upon. It is also highlighted by her that the prosecution has not been able to successfully establish that the contraband article which was sent to FSL was not tampered with during the course of its journey from the stage of seizing and sealing till its reaching the FSL. It is also emphatically submitted by her that P.W.1, Jayeshbhai B. Nayak, who is an independent witness, has not supported the prosecution case with regard to the recovery of Charas, seizure and sealing of the same and second panch has not been examined, therefore, the contents of the panchnama are not proved and in that view of the matter, the prosecution has not been able to prove the culpability of the accused for commission of the offence punishable under Section 21 of the NDPS Act. On the aforesaid premises, it is contended by Ms. Sadhana Sagar, learned advocate that the prosecution has not been able to establish the guilt of the accused and, therefore, the impugned judgment and order passed by the trial court deserves to be quashed and set aside by acquitting the accused. She, therefore, urged to

allow the appeal.

3.1. Alternatively, it is submitted by her that if this Court confirms the judgment and order of conviction passed by the trial court, then a lenient view may be taken so far as sentence imposed on the accused is concerned. According to her, the minimum sentence for commission of offence under Section 21 of the NDPS Act is RI for 10 years, but in the instant case the trial court has imposed sentence of RI for 12 years and, therefore, the sentence may be suitably modified and reduced to the minimum sentence of RI for 10 years.

4. Per contra, Ms. Archana Raval, learned APP for the respondent – State of Gujarat, has submitted that by voluminous evidence produced by the prosecution, complicity of the accused is proved beyond reasonable doubt. The accused was caught with contraband article Charas weighing 882 grams which was wrapped in a Sandesh Newspaper and was carried by the accused inside his shirt, and in presence of the members of the raiding party as well as panchas, the contraband article Charas was seized, samples were

drawn and sealed as per the sealing procedure. The said muddamal was sent to FSL for chemical analysis and the report of the FSL certified that the muddamal article sent for analysis was Charas. It is also highlighted by her that the prosecution has successfully proved that from the stage of seizure and sealing till the samples reached for analysis at FSL, the samples were in the safe custody of the police personnel and in this case the prosecution has examined police officers in whose safe custody the samples were kept from the stage of seizure, sealing and till they were delivered at FSL for chemical analysis. It is also pointed out by her that though P.W.1, Jayeshbhai B. Nayak has not supported the prosecution case with regard to the recovery of the contraband article from the accused, P.W.2, Bimal M. Rajvanshi and other members of the raiding party have supported the prosecution case and, therefore, the contents of the panchnama are proved from the evidence of P.W.2. On the aforesaid premises, it is contended by her that the prosecution has established the case against the accused beyond reasonable doubt and, therefore, the trial court was justified in recording the order of conviction and sentence against the

accused. She, therefore, contended that the appeal does not warrant interference of this court and it deserves to be dismissed as the same lacks merit. She, therefore, urged to dismiss the appeal.

4.1. So far as the alternative submission made by Ms. Sadhana Sagar, learned advocate of the accused, for reduction of sentence is concerned, it is submitted by her that it is true that for commission of offence under Section 21 of the NDPS Act minimum sentence prescribed is RI for 10 years, which may extend to RI for 20 years. In instant case, the trial court has imposed RI for 12 years and, according to her, looking to the quantity of contraband article Charas which was seized from the accused, and weighing 882 grams, no leniency can be shown towards the accused and the sentence imposed on him cannot be reduced.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of all vital features of the case and the

entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme Court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused persons and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

7. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in

the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> "The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

8. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police personnel during the course of the raid and seizure of the muddamal, contraband article, Charas.

9. At the outset, it may be stated that PW-1 Jayeshbhai B. Nayak, who is panch no.1, who has been examined by the prosecution (Exh.8), has not support ed the prosecution case. He, therefore, was declared hostile and the prosecution elected not to examine the second panch. Therefore, the case of the prosecution rests on the oral testimony of member of the raiding partly only, who has received the secret information and arranged for trap.

10. In this connection, the prosecution has examined and relied upon the oral testimony of PW-2 Bimal M.

Rajvanshi, at Exh.9. He is the P.I. of CID Crime, Gandhinagar, who has received secret information and has made arrangement for trap. He has inter alia testified about the secret information received by him and conveyance of the said secret information to his superior officers.

11. Thereafter, panchas were called, and after ascertaining their willingness to act as panchas, preliminary panchnama was prepared and thereafter the trap was arranged and the accused was intercepted and apprehended in the trap and from the accused contraband article Charas was recovered in presence of panchas and the members of the raiding party and thereafter the second part of the panchnama was drawn. He has also testified that he has complied with the statutory provisions contained under Section 50 of the NDPS Act by explaining to the accused with regard to their right to be searched in presence of a gazetted officer or a magistrate and since the accused did not insist that he should be searched in presence of a gazetted officer or a magistrate and expressed his willingness to be searched by P.W.2, he searched him

in presence of the panchas and the members of raiding party. From the evidence of P.W.2, it is clear that he has strictly complied with and adhered to the provisions of Sections 42 and 50 of the NDPS Act. He was cross-examined at length and in great detail by the learned advocate of the accused, but nothing substantial could be brought out from his cross-examination which would impeach his credibility and of any help to the accused to show that he has been falsely implicated in the case.

12. The prosecution has thereafter examined and relied upon the oral testimony of P.W.3 – Natvarsinh P. Macwana, Police Constable – State CID Crime, Narcotic Cell, at Exh.31, PW-4 – Uttambhai M. Jadav – PSI, CID Crime, Narcotic Cell at Exh.37, PW-5 Salim Mohammad Shaikh, SP, CID Crime, Gandhinagar at Exh. 40, PW-6 Vinaysinh L. Chauhan, Police Constable at Exh. 42. PW-3 and PW-4 were members of the raiding party. They have testified before the Court with regard to the role played by them. PW-5, at the relevant time was SP. He has inter alia testified about the secret information received by him which was

conveyed by PW-2 Bimal M. Rajvanshi. PW-6 – Vijaysinh L. Chauhan is the investigating officer and has filed the charge sheet.

17. All these witnesses were cross-examined at length and in great detail by the learned advocate of the accused, but nothing substantial could be brought out from their cross-examination which would impeach their credibility and of any help to the accused to show that he has been falsely implicated in the case.

18. A threadbare re-appreciation of the evidence produced by the prosecution, according to this Court, there is no manner of doubt that the secret information which was received by P.W.2 – Bimal M. Rajvanshi, was reduced into writing and was entered into the station diary and he has conveyed the said information to his official superior – PW-5 Salim Mohammad Shaikh, S.P. Necessary formalities were completed and thereafter he arranged for trap and the accused fell in the trap with contraband article Charas. It is also proved beyond doubt that he has complied with the provisions of Sections 42 and 50 of

the NDPS Act.

19. So far as the journey of the muddamal from the stage of seizure and sealing till its reaching at the FSL, the same was with the safe custody of the police personnel and the evidence of the witnesses is consistent in this regard. From the report sent by the FSL after analysis of the sample it is clear that the sample sent for anlaysis was Charas.

20. The contention that PW-1 Jayeshbhai B. Nayak, who is said to be an independent witness, in whose presence contraband article Charas was recovered from the Accused, has not supported the case of the prosecution and the prosecution has not examined the second panch, therefore, since the prosecution has failed to prove the contents of the panchnama, the prosecution case cannot be believed, is absolutely feeble and has no substance and merit.

21. It is well settled by catena of decisions of the Supreme Court that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the

prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision to the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panch as so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by the court on the ground that they are police officers. On the facts and in the circumstances of the case, this Court finds that the testimonies of P.W.2 – Bimal M. Rajvanshi, who has received secret information, PW-3 Natvarbhai P. Macwana, and PW-4 Uttambhai M. Jadav not only inspire confidence but get corroboration from the other evidence on record and from their evidence, the contents of the panchnama, which is on record at Ex.19, are proved.

22. On overall view of the matter, we do not find that any infirmity or illegality has been committed by the trial court in passing the impugned judgment and order of conviction as complicity of the accused for commission of the offence punishable under Section 21 of the NDPS Act has been duly proved.

23. We find ourselves in complete agreement with the finding, ultimate conclusion and resultant order of conviction passed by the trial court as, according to us, on the facts and in the circumstances of the case and on the basis of the evidence on record, no other conclusion could be reached except the one recorded by the trial court. Therefore, the order of conviction recorded by the trial court deserves to be maintained.

24. This takes us to examine the alternative plea raised by Ms. Sadhana Sagar, learned advocate of the accused, with regard to the reduction of sentence.

25. It is true that for commission of offence punishable under Section 21 of the NDPS Act, minimum

sentence is RI for 10 years which may extend to RI for 20 years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. In instant case, the accused has been sentenced to suffer RI for 12 years. However, looking to the weight of the contraband article Charas, which was recovered from the accused, which was 882 grams, which is less than 1 Kg, according to us, as per the amended Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (9 of 2001) which has come into effect from 2.10.2001, Charas weighing 882 grams, which is lesser than the commercial quantity (i.e., 2.5 kgs.) was recovered from the accused, if minimum sentence of RI for ten years and fine of Rs.1 lakh is imposed, it would meet the ends of justice. Therefore, according to us, sentence imposed on the accused is required to be modified by allowing this appeal qua sentence only.

26. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed qua sentence only. The impugned judgment and order of conviction passed against the accused is confirmed and

maintained. However, while upholding the conviction of the accused under section 8(C) read with Section 21 of the NDPS Act, the sentence imposed on the accused to undergo RI for 12 years and fine of Rs.1 lakh i.d., RI for one year, is modified and instead of that the accused Ismail Aminbhai Shaikh is sentenced to undergo the minimum sentence of RI for 10 years and fine of Rs.1 lakh i.d., RI for one year. The appeal is accordingly disposed of.

(A.M. Kapadia, J.)

(R.H.Shukla, J.)

Jayanti*